IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, VS. KENNETH L. LAY, et al., Defendants.	§	
RICHARD CHOUCROUN, MICHAEL KALIL, P.J. ELLISON KALIL, JOYCE BRIDGES, CARL BRIDGES, ROGER W. POWELL, ROGER W. POWELL IRA ROLLOVER UNDER THE TRUST OF CHARLES SCHWAB, INC., AND POWELL ENCHANTED OAKS, LTD. Plaintiffs, VS. ARTHUR ANDERSEN L.L.P., D. STEPHEN GODDARD, JR., DAVID B. DUNCAN, DEBRA A. CASH, ROGER WILLARD, THOMAS H. BAUER, ANDREW S. FASTOW, KENNETH L. LAY, AND JEFFREY J. SKILLING, Defendants and	§	CIVIL ACTION NO. H-03-3320 COORDINATED CASE

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ARTHUR ANDERSEN L.L.P.,	§
	§
Defendant/Third-Party Plaintiff	§
	§
VS.	§
	§
J.P. MORGAN CHASE & CO., J.P. MORGAN SECURITIES, INC. J.P. MORGAN INVESTMENT CORP., J.P. SECURITIES INC. HOLDING INC., CHASE SECURITIES, INC., J.P. MORGAN SECURITIES, LTD., CREDIT SUISSE FIRST BOSTON, INC., CREDIT SUISSE FIRST BOSTON (USA) INC., CREDIT SUISSE FIRST BOSTON CORP., DONALDSON LUFKIN & JENRETTE SECURITIES CORP., CREDIT SUISSE FIRST BOSTON (EUROPE) LTD., CANADIAN IMPERIAL BANK OF COMMERCE, CIBC INC., CIBC WORLD MARKETS CORP., CIBC WORLD MARKETS PLC, BANK OF AMERICA CORP., BANK OF AMERICA, N.A., BANC OF AMERICA SECURITIES LLC, BANC OF AMERICA SECURITIES LIMITED, BARCLAYS PLC, BARCLAYS BANK PLC, LEHMAN BROTHERS HOLDING, INC., LEHMAN BROTHERS, INC., and MICHAEL KOPPER,	§
	§
Third-Party Defendants.	§

MEMORANDUM AND ORDER

Pending before the Court in the above referenced cause, removed by some Third-Party Defendants[1] from the 21st Judicial District Court of Washington County, Texas on "related to"

[1] The "Removing Third-Party Defendants" are J.P. Morgan Chase & Co., JPMorgan Chase Bank, J.P. Morgan Securities Inc. (formerly known as Chase Securities Inc.), Credit Suisse First Boston, Inc., Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston Corp., Donaldson, Lufkin & Jenrette Securities Corporation, Canadian Imperial Bank of Commerce, CIBC Inc., CIBC World Markets Corp., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of America Corp., Bank of America, N.A., Banc of America Securities LLC, Lehman Brothers Inc., Barclays PLC, and Barclays Bank PLC.

bankruptcy jurisdiction, based on a Second Amended Petition,[2] to the United States District Court for the Western District of Texas, Austin Division, and then transferred to this Court by the Judicial Panel on Multidistrict Litigation for inclusion in MDL 1446, are the following motions:

> (1) Defendant Kenneth L. Lay's[3] motion to dismiss Plaintiffs second amended petition (instrument #13), pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b);
>
> (2) Defendant Jeffrey J. Skilling's[4] motion to dismiss Plaintiffs' second amended petition (instrument #31), pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b);
>
> (3) Plaintiffs Richard Choucroun, Michael Kalil, P.J. Kalil, Joyce Bridges, Carl Bridges, Roger W. Powell, Roger W. Powell IRA Rollover Under the Trust of Charles Schwab, Inc., and Powell Enchanted Oaks Ltd.'s motion to remand (instrument #38) this case to the 21st Judicial District Court of Washington County, Texas;

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[2] Copy included under Ex. B to #1, Notice of Removal.

[3] Lay was Enron's Chairman of the Board from 1986 and Chief Executive Officer.

[4] Skilling was an Enron director at all relevant times and served as President and Chief Executive Officer of Enron from February 2001-August 14, 2001.

(4) Third-Party Defendant Barclays PLC and Barclays Bank PLC's motion and amended motion to dismiss Arthur Andersen's third-party petition (instruments #45 and 80);

(4) Third-Party Defendants Bank of America, Lehman Brothers, and Merrill Lynch's motion to dismiss third party petition (instrument #48);

(5) Certain Third-Party Bank Defendants'[5] alternative motion, if the Court decides to grant Plaintiffs' motion to remand, to sever third-party claims (#52);

(6) Third-Party Defendants'[6] motion to dismiss (#78); and

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[5] Certain Third-Party Defendants include J.P. Morgan Chase & Co., JPMorgan Chase Bank, J.P. Morgan Securities Inc. (formerly known as Chase Securities Inc.), Credit Suisse First Boston, Inc., Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston Corp., Donaldson, Lufkin & Jenrette Securities Corporation, Canadian Imperial Bank of Commerce, CIBC Inc., CIBC World Markets Corp., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of America Corp., Bank of America, N.A., Banc of America Securities LLC, Lehman Brothers Inc., Lehman Brothers Holdings, Inc., Barclays PLC, and Barclays Bank PLC (collectively, "Third-Party Bank Defendants").

[6] This group is composed of J.P. Morgan Chase & Co., JPMorgan Chase Bank, J.P. Morgan Securities Inc. (formerly known as Chase Securities Inc.), Credit Suisse First Boston, Inc., Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston Corp., Donaldson, Lufkin & Jenrette Securities Corporation, Canadian Imperial Bank of Commerce, CIBC Inc., CIBC World Markets Corp.

They note that Arthur Andersen LLP "nonsuited its claims against third-party defendants Credit Suisse First Boston (Europe), J.P. Morgan Securities Ltd., JP Morgan Investment Corp., and J.P. Morgan Securities Holdings Inc. prior to removal of this action." #78 at 1 n.1.

(7) Defendant Thomas H. Bauer's[7] motion to dismiss Plaintiffs' Second Amended Petition (#81).

I. Procedural History

This case has undergone several sea changes from its initial appearance in state court, styled as *Jane Bullock, et al. v. Arthur Andersen LLP*, filed by twelve plaintiffs alleging fraud, negligence, and conspiracy to defraud against Enron's auditor and asserting that Arthur Andersen prepared misleading financial statements for Enron, on which plaintiffs relied in deciding to purchase Enron common stock.

That suit was first removed to the federal district court in the Western District of Texas on January 30, 2002 by Arthur Andersen LLP based on the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), but was remanded on March 5, 2002 for lack of subject matter jurisdiction because it did not satisfy the statutory definition of "covered class action."

A second removal was effected on May 1, 2002 by Andrew Fastow, again based on SLUSA and on "related to" bankruptcy jurisdiction solely on the grounds that the suit was a derivative

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[7] Bauer was a partner of Arthur Andersen LLP and, with others from that firm ("Andersen Defendants"), allegedly "conducted the external and internal audits and accounting of Enron's records, books financial statements, annual and quarterly SEC filings" and reviewed purportedly false statements of Enron and various Enron employees. Plaintiffs claim to have relied on these documents and statements in their decision to invest in Enron securities.

action that belonged to the debtor, Enron Corporation.[8] The federal district court in the Western District of Texas disagreed and again remanded the suit on June 17, 2002, concluding that most of the claims asserted were by stock purchasers, not holders, that Fastow's attempt to include this suit under SLUSA's "prospective class members" with those in other suits in other districts to constitute a "covered class" failed, that there was not unanimous consent by all served defendants to the removal, and that the claims were not derivative.[9]

Moreover, on April 11, 2002, Plaintiffs filed a First Amended Petition, in which eleven plaintiffs intervened (dubbed by Arthur Andersen as "the First Intervening Plaintiffs"), and then on December 20, 2002, before Arthur Andersen answered, a Second Amended Petition, in which eight more Plaintiffs intervened ("the Second Intervening Plaintiffs"), but eleven other previously named Plaintiffs were deleted from the suit. The latter pleading, which is the operative one here, alleges the same causes of action under Texas law as the original suit, i.e., fraud against all Defendants, "individually and in concert," negligence against the Andersen Defendants, and civil conspiracy to commit fraud against former Enron directors and officers, Arthur Andersen and several

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[8] Enron filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas on December 2, 2001. *In re Enron Corp.*, No. 01-16034, pending before the Honorable Arthur J. Gonzalez.

[9] The Honorable Henry Hudspeth's two remand orders are found as Exs. 1 and 2 to #26.

Andersen partners; the Second Amended Petition charges that Arthur Andersen LLP "pursued a conspiracy and common course of conduct with Enron Defendants and aided and abetted in the making of the false and misleading statements" and audits on which Plaintiffs relied in deciding to purchase or hold Enron stock and which resulted in loss of funds they had invested for retirement or otherwise.

On December 23, 2002, Arthur Andersen filed a motion for leave to file third-party petition for contribution claims against former Enron officers Andrew Fastow and Michael Kopper and a group of financial institutions that provided services to Enron, related to Plaintiffs' claims in the original *Bullock* petition, to which Andersen had filed an answer in March 2002, but not with respect to the petitions of the First and Second Intervening Plaintiffs, to which Arthur Andersen did not file an answer until January 13, 2003. Arthur Andersen explains that it filed the motion for leave far outside the thirty-day window allowed by Texas Rule of Civil Procedure 38(a)[10] to file a third-party petition relating to the

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[10] Rule 38(a), addressing "[w]hen defendant may bring in third party," provides in relevant part,

> At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the

original petition without leave of court.[11] Subsequently, along with its January 13, 2003 answer to the Second Amended Petition, Arthur Andersen also filed, as of right under Rule 38(a), a Third-Party Petition for contribution relating only to claims asserted by the First and Second Intervening Plaintiffs in the First and then the superseding Second Amended Petition. The Third-Party Petition alleged that the Third-Party Defendants had assisted Enron in creating, financing, and managing the illicit special purpose entities at the core of the purported Enron scheme and that they failed to disclose material information to Arthur Andersen about Enron's financial condition. Arthur Andersen began to serve that Third-Party Petition on Third-Party Defendants on January 30, 2003.

On February 14, 2003, the 21st Judicial District Court of Washington County *sua sponte* severed the claims of the Second Intervening Plaintiffs in the Second Amended Petition and the causes of action asserted by Arthur Andersen in its Third-Party Petition against Third-Party Defendants from the rest of the *Bullock* suit. The severed suit became the instant action, *Choucroun, et al., v. Arthur Andersen LLP, et al.* Thus the motion for leave to file a third-party petition, which related only to the original *Bullock* petition, and the motion to strike it (*see*

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action.

[11] On February 24, 2003 Plaintiffs did file a motion to strike the Third-Party Petition for failure of Arthur Andersen to obtain leave to file it, but the case was removed before the state court issued a ruling.

footnote 11) are no longer part of the instant action. The Third-Party Defendants then removed this newly severed, independent suit on February 27, 2003, within thirty days of service on them of the Third-Party Petition, based on "related to" bankruptcy jurisdiction under § 1334(b) and § 1452, and the removed action was subsequently transferred to this Court by the Judicial Panel on Multidistrict Litigation for consolidation or coordination with MDL 1446. Order, Ex. A to #1.[12]

II. Plaintiffs' Motion to Remand

Because the threshold issue here is this Court's jurisdiction, it addresses Plaintiffs' motion to remand first.

A. Notice of Removal

In the notice of removal, Third-Party Defendants argue that the factual and legal issues in this suit are related to those being adjudicated in the Enron bankruptcy proceedings and that if Plaintiffs prevail, the Defendants and/or the Third-Party Defendants may have claims against Enron for indemnity and contribution under Texas law[13] or under the Director and Officers

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[12] Moreover, the undersigned judge subsequently enjoined discovery in the *Bullock* case until it was permitted in *Newby* because the Court found that it would interfere with its administration of MDL 1446.

[13] In their memorandum of law in opposition to remand, or, in the alternative, if the Court chooses to remand Plaintiffs' claims, in support of their own motion to sever Arthur Andersen's third-party claims so they could remain in federal court, awaiting transfer by the MDL panel (#22 at 4), Certain Third-Party Defendants additionally assert that Defendants have potential statutory and common law rights of indemnity and or contribution against the Enron estate under New York, as well as under Texas, law. Moreover they point out that Article VII(B) of Enron's articles of incorporation provides its directors and officers

("D&O") Insurance Policies, which are assets of the debtor's estate. Moreover, they point out that several Third-Party Defendants have filed proofs of claim in the Enron bankruptcy action for contingent and unliquidated claims based on indemnity and contribution provisions in certain underwriting agreements that they entered into with Enron, and on which Defendant/Third-Party Plaintiff Arthur Andersen also relies for potential contribution. Thus, argue Removing Third-Party Defendants, the outcome of this litigation may directly affect claims filed in the Enron bankruptcy proceeding and the debtor's estate.

B. Plaintiffs' Opposition to Removal

Objecting that there is no "related to" bankruptcy jurisdiction based on rights of contribution or indemnification for Removing Defendants here and that Arthur Andersen's "third-party petition is an awkward attempt to cause delay,"[14] Plaintiffs

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indemnity rights against Enron's estate. They additionally cite statutory provisions of the state of Oregon, where Enron was incorporated, which might also obligate the estate to indemnify them. *Id.* at 4, 12, *citing* Ore. Rev. Stat. § 60.394 and Tex. Civ. Prac. & Rem. Code Ann. § 32.002. Relating to proofs of claims that a number of them have filed in the Enron bankruptcy proceeding, Third-Party Defendants maintain that they can also assert contribution and indemnity claims against Enron under Chapter 33 of the Texas Civil Prac. & Rem. Code because the D&O insurance coverage makes it a "responsible party." New York law permits the same kind of contribution claims relating to proof of claims filed in bankruptcy court. N.Y.C.P.L.R. § 1401. Because they have potential indemnity/contribution claims against Enron's directors and officers, who in turn conceivably may seek indemnification from the policy assets in Enron's bankruptcy estate, Third-Party Defendants argue that this "chain of indemnification provisions" is sufficient to sustain "related to" bankruptcy jurisdiction. *In re El Paso Refinery, LP*, 302 F.3d 343, 349 (5th Cir. 2002). #52 at 14.

[14] #39 at 3.

emphasize that the debtor, Enron Corporation, is not named as a defendant in this action. They further argue that Third-Party Defendants failed to obtain consent from all Third-Party Defendants,[15] as required by 28 U.S.C. § 1446(b), a procedural defect mandating remand. Furthermore, questioning whether the banks, which have not asserted any claims against Enron or its officers or directors, even have any entitlement to funds of the D&O policies, even more so because their own conduct in Enron's collapse has been challenged, Plaintiffs contend, "The stated grounds for removal could have, or should have, been raised by the former Enron officers and directors who actually might be entitled to make a claim on the Director and Officers Insurance Policies . . . . They, however, failed to timely raise the issue as a ground for removal." #39 at 3. Regarding contractual provisions in underwriting agreements between the financial institutions and Enron as a basis for contribution and indemnification claims, Plaintiffs point out that proofs of claim for a contractual right to contribution and indemnification usually are not covered under a D&O policy; even if they were, under Texas law contribution and indemnification claims would not accrue until there is a judgment against Defendants or Third-Party Defendants. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 205 (Tex. 1999)(a contract provision agreeing to indemnify against liability "entitle[s] an indemnitee to recover when the liability becomes fixed and

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[15] One financial institution and Michael Kopper did not join in or consent to the removal.

certain," as by a judgment). Plaintiffs also argue that if there is no insurance coverage, the debtor in bankruptcy is not a responsible party under Tex. Civ. Prac. & Rem. Code § 33.011(6)(B)(ii); *see also Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001). Plaintiffs insist that since it is uncertain whether the banks have a claim covered by the D&O policies, no bankruptcy asset is involved or at risk here. Not only are Removing Defendants' claims contingent and unliquidated, but "ironically" additional litigation would be necessary to determine if there is a cognizable claim affecting the debtor's estate.

Moreover, should the Court find that there is "related to" jurisdiction here, Plaintiffs argue that mandatory abstention under 28 U.S.C. § 1334(c) is appropriate here. Claiming the removal is meritless, Plaintiffs request an award of costs and expenses, including attorneys' fees, under 28 U.S.C. § 1447(c).

C. Court's Decision

The Court hereby incorporates its previous memoranda and orders in *Newby*. Because it has previously concluded that the law precludes some arguments raised here, it refers to relevant orders in applying that law here.

This Court has concluded that the unanimity rule does not apply to removals based on "related to" bankruptcy jurisdiction under 18 U.S.C. §§ 1334(b) and 1452. *See, e.g.*, #2143 at 38-49. Thus there was no procedural default based on failure to obtain consent from all served defendants.

This Court has also concluded that the broad reach of "related to" bankruptcy jurisdiction reaches potential claims for contribution and indemnity like those asserted here, while the fact that Enron has not been named as a defendant because it is in bankruptcy is not determinative. *See, e.g.*, #1714 at 8-37 in *Newby*; #56 at 4-5 n.1 in H-03-2264; #55 at 5-7 in H-03-1219.

With respect to mandatory abstention under 28 U.S.C. § 1334(c), Plaintiffs have failed to show that this suit can be timely adjudicated in state court. *See* #995 at 16-21; # 56 at 5 in H-03-2264.

Because removal was proper if Plaintiffs adequately pleaded their causes of action against Defendants here, Plaintiffs' request for fees and costs and Defendants' alternative motion to sever the third-party claims (#52) are moot.

III. Skilling, Lay, and Bauer's Motions to Dismiss Second Amended Petition

A. Defendants' Arguments

Defendants Skilling, Lay, and Bauer move to dismiss the second amended petition in part for failure to plead fraud and/or conspiracy to commit fraud with factual particularity (who, what, when, where, and how the statements were fraudulent), as required Texas law[16] and by Federal Rules of Civil Procedure 9(b)[17] and

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[16] The elements for fraud in Texas are

> (1) that a material misrepresentation was made; (2) that it was false; (3) that when the speaker made it, he knew it was false or made it recklessly, without any knowledge of the truth as a positive assertion; (4) that he

12(b)(6). *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177-79 (5th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997). They complain that, in impermissible group pleading, Plaintiffs, without any distinctions, lump all Enron director/officer Defendants together with general allegations.[18]

> made it with the intention that it be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury.

Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977).

To plead civil conspiracy to defraud under Texas law, a plaintiff must allege the following elements: (1) two or more persons; (2) an unlawful object to be accomplished; (3) a meeting of the minds on the object or course of action (i.e., specific intent to engage in wrongful conduct); (4) one or more unlawful overt acts; and (5) damages as a proximate result. *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 553 (Tex. 1998). To allege specific intent the plaintiff must plead that the parties were aware of the harm or wrongdoing, but agreed to participate in the conspiracy anyway. *Id.* at 553. The pleading must meet the heightened particularity standard of Fed. R. of Civ. P. 9(b). *Castillo v. First City Bancorporation of Texas, Inc.*, 43 F.3d 953, 961 (5th Cir. 1994).

[17] Rule 9(b) provides in relevant part, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The Fifth Circuit requires a plaintiff alleging fraud to plead at least time, place, contents of the purported false representation(s), and identity of the speaker and what he obtained from that misrepresentation. *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997).

[18] As examples, the Second Amended Petition at 5, ¶ 15, asserts,

> It is appropriate to treat Enron Defendants as a group for pleading purposes and to presume that the false, misleading and incomplete information conveyed in Enron's public filings, press releases, and other publications as alleged herein are the collective actions of the narrowly defined

Moreover they complain that Plaintiffs do not assert facts

group of Defendants identified above.

The pleading at 6, ¶ 17 further alleges,

> The Enron Defendants participated in the drafting, preparation, and/or approval of various public and shareholder and investor reports and other communications complained of herein and were aware of, or recklessly disregarded, the misstatements contained therein and omissions therefrom, and were aware of their materially false and misleading nature. Because of their Board membership or executive and managerial positions with Enron, each of the Enron Defendants had access to the adverse undisclosed information about Enron's business prospects and financial condition and performance as particularized and knew (or recklessly disregarded) that these adverse facts rendered the positive representations made by or about Enron and its business issued or adopted by Enron materially false and misleading.

Despite a fiduciary duty to its shareholders and the established code of ethics at Enron, both of which allegedly were relied upon by Plaintiffs, Enron Defendants, including Lay, Skilling and the Board, approved placement of Fastow, despite a conflict of interest, in charge of LJM1 and LJM2 and allowed him to engage in self dealing, from which he personally enriched himself, as did the other Enron Defendants. *Id.* at 10-13, 28, 36-37. These and other special purpose entities employed by Defendants for numerous off-balance-sheet transactions were improper because they were not independent of Enron nor was there any risk to third-party investments. *Id.* at 29, ¶ 77.

The Second Amended Petition also alleges that Arthur Andersen LLP, hired by Enron to "provide accounting data necessary for compliance with Texas state securities statutes and requirements of the NYSE," breached its "duty of full and complete disclosure to shareholders and Enron and its employees, as well as regulatory authorities, the stock exchange and state law . . . by failing to fully and adequately disclose Enron's debt positions by overstating Enron's net income for each year beginning in 1997 and by failing to fully and adequately disclose Enron's involvement with private investment limited partnerships formed by Enron executives." *Id.* at 7, ¶ 19. Andersen was also hired to "provide its opinion that Enron's system of internal controls was adequate"; the petition charges that Arthur Andersen's resulting opinion was false and misleading. *Id.* at 8, ¶ 20.

demonstrating that any of the statements purportedly made by these Defendants was false when made or was not merely inactionable puffing. Plaintiffs do not allege that these Defendants had any role in preparing the allegedly false and misleading statements made by Enron and Arthur Andersen LLP, nor that they participated in any related-party transactions with special purpose entities (such as LJM, LJM2, Chewco and RADR), nor that any injury to Plaintiffs was caused by statements made by these Defendants.[19] Nor do Plaintiffs plead that they relied on any specific statements made by Skilling or Lay to their detriment in deciding to invest in or sell Enron stock, as is required to state a claim

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[19] Under Texas law, in a claim for fraud the alleged false statement must be the direct and proximate cause of injury to the plaintiff. *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 211 (Tex. App.--Houston [14th Dist.] 2001).

Regarding Plaintiffs' reliance upon Defendants' false and misleading representations about Enron, the Second Amended Petition, at 41, ¶¶ 114-115, states,

> Had Plaintiffs known of the true operation and financial results of Enron, which due to the actions or inactions of Defendants were not disclosed, Plaintiffs would not have purchased or otherwise acquired their Enron common stock or, if they had acquired Enron common stock in the past, they would have divested their holdings of Enron stock before its tumultuous decline.
>
> Plaintiffs were injured because the risks that materialized were risks of which they were unaware as a result of Defendants' material misrepresentations, omissions and other fraudulent conduct alleged herein. The decline in the price of Enron's sock [*sic*] was caused by the public dissemination of the true facts, which were previously concealed or hidden. Absent said Defendants' wrongful conduct, Plaintiffs would not have been injured.

for common-law fraud, nor identify when and what types of Enron securities they purchased or sold.

Similarly, argue Defendants, because under Texas law civil conspiracy is a derivative claim that must rest on an underlying tort, if there is no tort adequately pleaded, the civil conspiracy claim fails as a matter of law. *Hunt v. Baldwin*, 68 S.W.3d 117, 133 (Tex. App.--Houston [14th Dist.] 2001); *Trostle v. Trostle*, 77 S.W.3d 908, 915 (Tex. App.--Amarillo 2002). Defendants insist that since Plaintiffs have failed to plead fraud adequately, their civil conspiracy claim also fails.[20]

B. Court's Conclusions

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[20] Bauer also argues that Plaintiffs' negligence claim against Andersen Defendants under Texas law fails because Plaintiffs fail to assert that they are members of the limited group of persons to whom the Arthur Andersen auditors could conceivably have owed a duty. *See Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 612 (5th Cir. 1996), *cert. denied*, 519 U.S. 869 (1996). This Court has previously rejected this argument as it relates to the alleged scheme to defraud investors in *Newby*, in essence mirrored in other terms in the Second Amended Petition here. #1194 at 95-97 n.47; also available: *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F. Supp. 2d 549, 610 n.47 (S.D. Tex. 2002). *See, e.g.*, Second Amended Petition at 29, ¶ 76:

> . . . . With respect to these entities, all of the Defendants herein approved these as "off-balance sheet" entities because it enabled these Defendants to represent the shares of Enron to be more attractive to investors, such as Plaintiffs, These representations caused the stock to be sold at a higher price when the Plaintiffs herein purchased the stock, and while the Defendants were unloading the stock at great profit to themselves.

See also id. at 41, ¶ 110: "The purpose and effect of this scheme was to induce Plaintiffs to purchase Enron common stock at artificially inflated prices or take other action contrary to their financial well being."

As pointed out by Plaintiffs, their pleadings were drafted solely under Texas law in accordance with the Texas Rules of Civil Procedure, without discovery, and while the case was pending in state court, during which time Defendants never filed special exceptions to complain of the petition. Now that the case has been removed to federal court, however, the Court requires that the pleadings must satisfy the standards of federal procedural rules. It concurs with Defendants that the Second Amended Petition does not comply with those standards.

Plaintiffs have failed to identify when they purchased their stock and upon which alleged misrepresentations they relied. Moreover, nearly all the statements they quote are very general and conclusory, often without identification of the speaker, and Plaintiffs have failed to allege specific facts that show that the statements were false, no less that Defendants knew that the statements were false when made. Factual allegations demonstrating particular and personal involvement in, and resulting personal knowledge of, the alleged fraudulent related-party transactions or approval of such transactions, or review or auditing of such transactions, or the alleged self-dealing arising out of them, by Skilling, Lay, and Bauer are also absent.

As noted, the Court finds that Plaintiffs have pleaded a cause of action for negligence against the Andersen Defendants. *See* footnote 20 of this memorandum and order.

The Court finds Plaintiffs should be given the opportunity to amend to cure the pleading deficiencies of their

fraud cause of action and, necessarily, the derivative civil conspiracy claim, in the Second Amended Petition.

IV. Third-Party Defendants' Motions to Dismiss Claims Against Them in Arthur Andersen LLP's Third-Party Petition[21]

A. Third-Party Defendants' Contentions

Arthur Andersen LLP's Third-Party Petition seeks a determination of proportionate responsibility and contribution from Third-Party Defendants, which Arthur Andersen contends qualify as "defendants" under Section 33.011(2) and as responsible parties" under Section 33.011(6)(A) of the Texas Civil Practice and Remedies Code, and under Tex. R. Civ. P. 38(a) for any judgment awarded against Arthur Andersen relating to Plaintiffs' Second Amended Petition's claims of fraud, civil conspiracy to defraud, and negligence based on alleged misstatements in Enron's financial statements for fiscal years from 1997-2001 and on false or misleading statements by individual Enron Defendants.

As noted, three[22] separate motions to dismiss the Third-Party Petition (#48, 52, and 80) have been filed. On July 2, 2003, before the transfer of this action to this Court, the parties filed a stipulation (#87) extending the time for Arthur Andersen's responses to these motions until twenty days after the Judicial Panel ruled on Plaintiffs' motion to vacate the

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[21] A copy of Arthur Andersen LLP's Third-Party Petition Against Responsible Parties and Cross-Claims Against Defendant Andrew Fastow is included in the removal papers in # 1 and is attached as Ex. A to the Appendix, #49.

[22] Not counting the first motion (#45) from Barclays PLC and Barclays Bank PLC, which was superseded by an amended motion (#80).

conditional transfer order previously issued, and allowing twenty-one days after service of the responses for Third-Party Defendants to file replies. The final transfer order (#88) was entered on August 15, 2003, yet no response has been filed. The Court is unsure if responsive pleadings were lost in the transfer.

Because Plaintiffs' re-pleading of their fraud and conspiracy claims may affect the third-party claims, the Court will require Arthur Andersen to file responses to the motions to dismiss third-party claims within twenty days of the filing of Plaintiffs' new complaint; Third-Party Defendants shall, if appropriate file, any replies within twenty days of receipt of Arthur Andersen's responses.

V. Order

For the reasons indicated above, the Court

ORDERS that Plaintiff's motion to remand (#38) is DENIED and Certain Third-Party Defendants' alternative motion to sever third-party claims (#52) is MOOT. The Court further

ORDERS that Defendants Skilling, Lay, and Bauer's motions to dismiss the second-amended petition (#13, 31, 81) are DENIED. Plaintiffs shall file amended pleadings (now styled a complaint) within twenty days of entry of this order to cure pleading deficiencies relating to their fraud and conspiracy claims under Rule 9(b). Defendants shall timely file responsive pleadings. Finally, the Court

ORDERS that Arthur Andersen LLP shall file responses to the motions to dismiss third-party claims (#45, 80, 78) within

twenty days of the filing of Plaintiffs' new complaint; Third-Party Defendants shall, if they desire, file replies within twenty days of receipt of Arthur Andersen's responses.

SIGNED at Houston, Texas, this 9th day of June, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE